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ABDUL HALIM MOHAMAD v. SMALL MEDIUM ENTERPRISE DEVELOPMENT BANK MALAYSIA BERHAD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ATAN MUSTAFFA YUSSOF AHMAD J
[SUIT NO: WA-22NCC-857-11-2023]
13 JANUARY 2025

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Abstract – *(i) Silence cannot constitute acceptance to a contract unless there is a legal duty to speak. This principle is codified in ss. 3 and 4 of the Contracts Act 1950 which makes it clear that a positive act of communication is required for acceptance. Mere silence or inaction cannot be construed as assent by conduct; (ii) A director/shareholder's obligations as guarantor under guarantee and indemnity agreements are independent of his status as director/shareholder of a company. These obligations persist until discharged by full settlement. Neither the disposal of the director/shareholder's shares nor his resignation extinguishes his liabilities, particularly when the agreement designates him as a principal debtor; (iii) A lender has no duty to release a guarantor simply because they wish to divest their interest in the borrower, unless there is a formal application from the borrower and the lender agrees. The relationship between a lender and guarantor is primarily contractual, and absent specific contractual provisions or a formal request from the borrower, the lender is not obligated to replace a guarantor, even if it is aware of a share sale agreement between the guarantor and a third party.*

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CONTRACT: *Guarantee – Guarantor – Borrower company obtained loan facilities from financial institutions – Loan facilities guaranteed by directors/shareholders – Repayment fell into arrears – Director/guarantor sold shares to third party – Third party agreed to replace director/guarantor as guarantor – Director/guarantor sought to be released from obligations as guarantor under loan facilities – Whether obligations as guarantor independent of position as director/shareholder – Whether there was negligence in failing to facilitate change of guarantor – Whether financial institutions privy to or bound by any arrangement between director/guarantor and third party regarding guarantee*

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CIVIL PROCEDURE: *Striking out – Application for – Borrower company obtained loan facilities from financial institutions – Loan facilities guaranteed by directors of borrower company – Repayment fell into arrears – Director/guarantor sold shares to third party – Third party agreed to replace director/guarantor as guarantor – Director/guarantor sought to be released from obligations as guarantor of loan facilities – Whether there were triable issues – Whether there was reasonable cause of action – Whether action plainly unsustainable – Whether abuse of process – Whether action warranted full trial – Whether disputes could be summarily determined – Whether director/guarantor's action ought to be struck out*

I

The plaintiff was a former director and shareholder of the third defendant ('D3'), a manufacturer of pharmaceutical products. In 2006, D3 obtained a financing facility of RM7 million ('financing facility') from the first defendant ('D1'). This was documented in a facility agreement. As part of this facility, the directors of D3 at the time, including the plaintiff, Syed Redzuan, Azmy and Rinol Azhar signed a joint and several guarantee and indemnity agreement ('financing facility guarantee'). Rinol Azhar left as director in 2008. D1 released him and replaced him with one Kamaruddin as guarantor. In 2009, D3 secured a hire purchase facility from D1 for equipment and machinery ('HP facility'). This was documented in a hire purchase agreement. The directors at that time, including the plaintiff, Syed Redzuan, Azmy and Kamaruddin, signed a joint and several guarantee and indemnity agreement ('HP guarantee'). Pursuant to a vesting order, D1 transferred D3's financing accounts to the second defendant ('D2'), a wholly-owned subsidiary of D1. When repayments fell into arrears, D2 filed two actions regarding the financing facility. D2 obtained a judgment-in-default in both suits ('JIDs'). In 2022, the plaintiff wrote to D1/D2 informing them that the fourth defendant ('D4'), had agreed to buy his shares in D3 and would replace him as guarantor. The plaintiff and D4 then entered into a share sale agreement ('SSA'). The SSA stated that D4 would assist in obtaining the approval from D1/D2 and MARA to substitute and replace the plaintiff's position as guarantor upon completion of the share transfer. D4 had provided D2 with a copy of the SSA *via* WhatsApp. The share transfer was completed in 2022 and D4 became a director of D3. D2 wrote to D3 seeking confirmation and evidence regarding the change of guarantor under the SSA. D2 later filed applications for leave to execute the JIDs after a lapse of six years, including seeking leave to file bankruptcy proceedings against the guarantors. The plaintiff filed this action for his release as guarantor. D1 and D2, on the other hand, filed encls. 16 and 19 to strike out the plaintiff's writ and statement of claim. The plaintiff amended his statement of claim to include: (i) new allegations of negligence and breach of duty of care against D1 and D2 for failing to replace the plaintiff with D4 as a guarantor despite being notified; and (ii) additional material facts regarding D1 and D2's knowledge of the SSA and their inaction after the plaintiff's request to be discharged as guarantor. D1 and D2 then amended encls. 16 and 19 and proceeded with encls. 128 and 129, the amended notices of application in encls. 16 and 19, to strike out the plaintiff's writ and amended statement of claim. The plaintiff primarily argued that (i) D1 and D2 were negligent in failing to respond to or act upon his letter dated 14 January 2022 requesting the change of guarantor, and in failing to secure D4 as guarantor when she became a director of D3; (ii) D1/D2's silence on his application amounted to implicit approval of the change in guarantor, and their failure to secure D4 as guarantor during her directorship constituted negligence; and (iii) D1/D2's conduct was inconsistent with their previous practice of releasing

A guarantors (Rinol Azhar and Kamaruddin) when they ceased being directors. D1 and D2, on the other hand, contended that: (i) the guarantee agreements were entered into by the plaintiff in his personal capacity, not as a director, and that these agreements explicitly stated the guarantor's obligations continued until all debts were fully settled; (ii) the vesting order, of which B the plaintiff had clear knowledge through multiple channels including published advertisements and direct notice, transferred all rights and obligations to D2, leaving no privity between the plaintiff and D1; (iii) any banker-customer relationship had been terminated through notices of demand and termination in 2015, prior to the JIDs, and the plaintiff never C challenged his status as guarantor after his resignation as director in 2020 despite knowing about these judgments; and (iv) they had no duty to respond to the plaintiff's letter about the change in guarantor, were not privy to the SSA and had never received a formal application from D4 to become a guarantor.

D **Held (granting order in terms of D1 and D2's applications in encls. 129 and 128; striking out plaintiff's action):**

(1) A perusal of the financing facility guarantee and the HP guarantee revealed that the plaintiff's liability as guarantor was indeed in his personal capacity and not contingent on his position as shareholder or E director of D3. Clauses 8 and 9 of the financing facility guarantee clearly indicated that changes in D3's shareholding or directorship did not affect the plaintiff's obligations as guarantor. Furthermore, both agreements expressly stated that they were continuing guarantees. Clause 14 of the HP guarantee contained almost identical wording. D1 and D2 were not F privy to the agreement between the plaintiff and D4. Any arrangement therein for D4 to assume the guarantees did not bind D1 or D2 in the absence of their express agreement. Clause 6.3(c) of the SSA merely imposed an obligation on D4 to facilitate the substitution but did not in itself effect the change. As such, the SSA had no impact on the subsisting G contractual obligations of the plaintiff under the guarantees. Further, both guarantee agreements defined the plaintiff as a principal debtor, not merely as surety. As principal debtor, the plaintiff was not automatically discharged by virtue of changes in D3's shareholding, directorship or constitution. His liability persisted as long as the loans remained outstanding. (paras 24, 26, 27, 29, 30 & 33)

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(2) There was no basis for imposing on D1 and D2 a duty of care to release the plaintiff simply because he wished to divest his interest in D3. The plaintiff's obligations as guarantor stemmed from the guarantee agreements, and in this context, the lender-borrower relationship was I governed entirely by the contractual terms. D1/D2's responsibilities to the plaintiff could not extend beyond what was stipulated in the contract

documents. The plaintiff's argument, that D1 and D2 were negligent in failing to respond to his letter dated 14 January 2022, was untenable. The letter could not be construed as a formal application for substitution of guarantor, as this would need to emanate from the borrower, D3. A guarantor cannot unilaterally seek his own discharge without the involvement of the primary obligor. Moreover, the letter was issued to D1 after the vesting order, which had transferred the administration of the loans to D2. D1 was therefore not the correct party to address the request to. The plaintiff's argument that D1/D2's silence in response to his letter should be taken as consent, based on *Jetara Sdn Bhd v. Maju Holdings Sdn Bhd*, was not applicable in this context. Sections 3 and 4 of the Contracts Act 1950 clearly defined how communication of proposals and acceptances are to be made, and silence does not constitute acceptance. As to the failure to replace the plaintiff with D4, there was similarly no legal foundation for a duty on D1/D2's part. In a banker-customer relationship, the bank has a duty to exercise reasonable care and skill in interpreting, ascertaining, and carrying out the customer's instructions, adhering to the standard of care expected of an agent fulfilling its principal's mandate. However, in the present case, there was no mandate by D3 as customer to vary the guarantees or accept D4 as substitute. In the absence of instructions from D3, D1 and D2 had no positive obligation to proactively effect a change of guarantor simply because they may have been aware of the SSA. (paras 42-45)

(3) In the cases of Rinol Azhar and Kamaruddin, the evidence showed that D3, as the borrower, made formal applications to D1/D2 requesting their release as guarantors. This was a critical fact that distinguished those situations from the present case. The release of a guarantor was not an automatic right upon ceasing to be a director or shareholder, but rather a matter of contractual discretion to be exercised by the lender upon proper application by the borrower. Neither D3 nor D4 made any formal application to D1/D2 for the release of the plaintiff as guarantor or for the substitution of D4 in his place. The plaintiff's letter dated 14 January 2022 to D1, informing his intention to sell his shares and requesting to be released as guarantor, did not constitute a proper application by the borrower. Further, the plaintiff acknowledged in the said letter that his guarantee was given in his personal capacity, not as a director. Therefore, D1/D2's treatment of the plaintiff was not inconsistent or discriminatory, but rather based on the specific circumstances of his case and in line with their contractual rights and commercial judgment. (paras 72 & 73)

(4) The principle established in *Hong Leong Bank Bhd v. WT Industries Sdn Bhd & Ors* was directly applicable to this case, where, it was held that no fiduciary duty or duty of care exists in a banker-borrower relationship, which was governed strictly by the contractual terms, and

therefore, the bank's recall of the facilities was lawful and not malicious. This principle extended to the relationship between a lender and a guarantor. This clear statement of principle undermined the plaintiff's assertion that a fiduciary relationship existed. Furthermore, the guarantee agreements signed by the plaintiff clearly set out the terms of his obligations and D1/D2's rights. No fiduciary relationship existed between the plaintiff and D1/D2. Their relationship was purely contractual, governed by the terms of the guarantee agreements. Consequently, there could be no breach of fiduciary duty as alleged by the plaintiff. D1/D2's actions in maintaining the plaintiff's guarantor status and not securing his release or substitution were entirely within their contractual rights and did not violate any fiduciary obligations. (paras 78-81)

(5) This case did not involve any complex factual or legal issues warranting a full trial. The disputes essentially centred around the construction of the guarantees and the legal effect of the SSA, the vesting order and the plaintiff's resignation as director and shareholder of D3. These were all questions of law that were capable of summary determination based on established contractual and legal principles. The various complaints of breach of duty, negligence and misrepresentation did not give rise to triable issues as the essential elements of such causes were simply not made out. There were also no material disputes of fact on the central issues that required findings upon oral testimony. Questions such as whether the SSA bound D1/D2 and whether the plaintiff's obligations as guarantor persisted despite his resignation and the share sale were all matters of contractual interpretation. D1 and D2's applications to strike out the plaintiff's action were allowed. The plaintiff's claim was plainly unsustainable and devoid of any triable issues. It was an abuse of process to compel D1 and D2 to endure the time and expense of defending such an unmeritorious action through trial. (paras 82, 83 & 85)

Case(s) referred to:

Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd [2013] 1 CLJ 24 FC ***(refd)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(foll)***
Astana International Sdn Bhd & Ors v. RHB Bank Bhd & Ors [2012] CLJU 94; [2012] 1 LNS 94 HC ***(refd)***
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(foll)***
Bank Pembangunan Malaysia Bhd v. Ketheeswaran M Kanagaratnam [2022] 6 CLJ 513 CA ***(refd)***
Chung Khiaw Bank Ltd v. Soi Huan & Ors [1985] CLJU 71; [1985] 1 LNS 71 HC ***(refd)***
CIMB Bank Bhd v. Lee Kim Kee & Ors And Another Appeal [2018] 9 CLJ 168 CA ***(dist)***
Dato' Mohamad Yusof A Bakar & Anor v. Datuk Bandar Kuala Lumpur [2019] CLJU 1494; [2019] 1 LNS 1494 CA ***(dist)***
Heng Cheng Swee v. Bangkok Bank Ltd [1979] CLJU 179; [1979] 1 LNS 179 FC ***(refd)***

Hong Leong Bank Bhd v. WT Industries Sdn Bhd & Ors [2005] 8 CLJ 239 HC ***(foll)***
Jetara Sdn Bhd v. Maju Holdings Sdn Bhd [2007] 3 CLJ 41 CA ***(dist)***
Metroplex Holdings Sdn Bhd v. Commerce International Merchant Bankers Bhd [2013] 8 CLJ 329 CA ***(dist)***
Mohamed Yusop Abdul Wahab v. American Express (M) Sdn Bhd [2002] 7 CLJ 81 HC ***(foll)***
New Ace Digital Print Sdn Bhd & Anor v. Public Bank Bhd [2017] 9 CLJ 439 CA ***(dist)***
Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC ***(dist)***
Sivakumar Varatharaju Naidu v. Ganesan Retanam [2010] 9 CLJ 825 CA ***(dist)***
WT Steel Sdn Bhd v. SVR Builders (M) Sdn Bhd & Ors [2023] CLJU 1520; [2023] 1 LNS 1520 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 3, 4(1)
Development Financial Institutions Act 2002, s. 16(3), (4)
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d)

For the plaintiff - Prabhkirat Singh; M/s Mohana Krishnan
For the 1st & 2nd defendants - Amelda Md Din & Siti Salehah; M/s Amelda Fuad Abi & Aidil

Reported by Lina E

JUDGMENT

Atan Mustaffa Yussof Ahmad J:

[1] Before the court are applications by two financial institutions to strike out a claim brought by a former director and shareholder of a borrower company who seeks to be released from his obligations as guarantor of certain loan facilities. The plaintiff contends that he should be discharged as guarantor following the sale of his shares and directorship to a third party who had agreed to replace him as guarantor, and alleges negligence and breach of duty against the defendants for failing to facilitate this change of guarantor. The defendants argue that the plaintiff's obligations as guarantor are independent of his position as director/shareholder, that they were not privy to nor bound by any arrangement between the plaintiff and the share purchaser regarding the guarantee, and that the plaintiff's claims disclose no reasonable cause of action and are an abuse of process.

Background Facts

[2] The plaintiff, Abdul Halim bin Mohamad, was a former director and shareholder of the third defendant, Xorix Sdn Bhd ("D3"), a manufacturer of pharmaceutical products. In 2006, D3 obtained a financing facility of RM7 million ("financing facility") from the first defendant, Small Medium Enterprise Development Bank Malaysia Berhad ("D1"). This was documented in a facility agreement dated 30 August 2006. As part of this facility, the directors of D3 at the time, including the plaintiff, Syed Redzuan

A bin Syed Salim Shatri ("Syed Redzuan"), Azmy bin A Hamid ("Azmy") and Rinol Azhar bin Ridzuan ("Rinol Azhar"), signed a joint and several guarantee and indemnity agreement dated 30 August 2006 ("financing facility guarantee").

B **[3]** Rinol Azhar left as director in 2008. D1 released him and replaced him with Kamaruddin bin Mat Desa ("Kamaruddin") as guarantor. Later in 2011, Kamaruddin left and D1 released him as guarantor without requiring a replacement.

C **[4]** In 2009, D3 secured a hire purchase facility from D1 for equipment and machinery ("HP facility"). This was documented in a hire purchase agreement dated 9 July 2009. The directors at that time, including the plaintiff, Syed Redzuan, Azmy and Kamaruddin, signed a joint and several guarantee and indemnity agreement dated 9 July 2009 ("HP guarantee").

D **[5]** Pursuant to a vesting order dated 26 January 2015 ("vesting order"), D1 transferred D3's financing accounts to the second defendant, SME Asset Management Sdn Bhd ("D2"), a wholly-owned subsidiary of D1. When repayments fell into arrears, D2 filed two actions in 2016: Kuala Lumpur Sessions Court Suit No: WA-B52M-481-09/2016 ("Suit 481") in the Kuala Lumpur Sessions Court on 28 September 2016 regarding the HP facility, and
E Kuala Lumpur High Court Suit No: WA-22NCC-364-10/2016 ("Suit 364") in the Kuala Lumpur High Court on 25 October 2016 regarding the financing facility. D2 obtained judgment in default in both suits on 3 November 2016 and 25 November 2016, respectively ("JIDs").

F **[6]** On 14 January 2022, the plaintiff wrote to D1/D2 informing them that the fourth defendant, Dr Maryam Al-Batul binti Azizuddin ("D4"), had agreed to buy his shares in D3 and would replace him as guarantor. On 25 February 2022, the plaintiff and D4 entered into a share sale agreement ("SSA"). Clause 6.3(c) of the SSA stated that D4 would assist in obtaining approval from D1/D2 and MARA to substitute and replace the plaintiff's
G position as guarantor upon completion of the share transfer. On 29 June 2022, D4 had provided D2 with a copy of the SSA *via* WhatsApp to one Puan Zalina of D2.

[7] The share transfer was completed in 2022 and D4 became a director of D3 on 3 August 2022. On 17 February 2023, D2 wrote to D3, seeking
H confirmation and evidence regarding the change of guarantor under the SSA. On 27 June 2023, D2 filed applications for leave to execute the JIDs after a lapse of six years, including seeking leave to file bankruptcy proceedings against the guarantors.

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[8] On 19 January 2024, D4 resigned as director of D3 though remained a shareholder. The plaintiff filed this action seeking various declarations and orders regarding his release as guarantor. On 5 January 2024, D1 and D2 filed applications (encls. 16 and 19) to strike out the plaintiff's writ and statement of claim. Subsequently, on 13 August 2024, the plaintiff succeeded in amending his statement of claim to include new allegations of negligence and breach of duty of care against D1 and D2 for failing to replace the plaintiff with D4 as a guarantor despite being notified and additional material facts regarding D1 and D2's knowledge of the SSA and their inaction after the plaintiff's request to be discharged as guarantor. D1 and D2 then amended encls. 16 and 19 and proceeded with encls. 128 and 129, the amended notices of application in encls. 16 and 19, to strike out the plaintiff's writ and amended statement of claim.

Enclosure 128

[9] D2's application in encl. 128 seeks orders to strike out the plaintiff's writ of summons dated 24 November 2023 and amended statement of claim dated 16 August 2024 pursuant to O. 18 rr. 19(1)(a) and/or 19(1)(b) and/or 19(1)(d) of the Rules of Court 2012. The application also seeks costs against the plaintiff and such further relief as the court deems fit and proper.

[10] The key grounds of the application are:

(i) through various facility agreements, D1 had granted one conventional and three Islamic financing facilities to D3, with the plaintiff as guarantor;

(ii) the plaintiff has not disputed that D3 and the guarantors (including himself) failed to pay the monthly installments, leading to the JIDs being obtained;

(iii) despite having knowledge of the vesting order dated 26 January 2015, which transferred D3's financing accounts from D1 to D2, the plaintiff brought this action seeking discharge as guarantor based on the SSA;

(iv) the plaintiff executed the financing facility guarantee and the HP guarantee ("the guarantee agreements") in his personal capacity, not as director of D3, thus his claim based on the SSA lacks legal basis;

(v) the plaintiff's allegations of breach of fiduciary duty, duty of care and negligence against D2 in relation to replacing him as guarantor have no basis since the banker-customer relationship was terminated on 27 October 2015 and JIDs were obtained;

(vi) the plaintiff's action is an abuse of court process aimed at delaying D2's leave applications to enforce the JIDs;

A (vii) D2 did not receive any application from D4 to substitute as guarantor in place of the plaintiff, and D4 was not even appointed as D3's director as of 29 June 2022; and

(viii) the plaintiff's cause of action fundamentally lacks merit and his claims are scandalous, frivolous, vexatious and an abuse of court process.

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Enclosure 129

[11] D1's application in encl. 129 seeks orders to strike out the plaintiff's writ of summons dated 24 November 2023 and amended statement of claim dated 16 August 2024 pursuant to O. 18 rr. 19(1)(a) and/or 19(1)(b) and/or
C 19(1)(d) of the Rules of Court 2012. The application also seeks costs against the plaintiff and such further relief as the court deems fit and proper.

[12] The grounds of the application primarily revolve around the vesting order and the plaintiff's knowledge of it. D1 contends that the plaintiff had knowledge of the vesting order through multiple channels: when the plaintiff
D filed a memorandum of appearance in Suit 481, where the vesting order was pleaded; through D1's notice dated 16 February 2015; through D2's answers to interrogatories sworn by Azaharie bin Siman on 2 February 2024; and through advertisements published in Berita Harian (Peninsula and Borneo editions) and New Straits Times (Peninsula and Borneo editions) on
E 6 February 2015 in compliance with the Development Financial Institutions Act 2002. D1 argues that after the plaintiff's resignation as director on 16 January 2020, he never disputed his status as guarantor despite knowing about the judgments in default. D1 contends that the effect and impact of the vesting order justifies striking out the writ and amended statement of claim
F as the plaintiff has failed to raise a reasonable cause of action against D1 and has abused the court process by naming D1 despite knowing about the valid and effective vesting order.

Parties' Respective Submissions

[13] The plaintiff primarily argues that D1 and D2 were negligent in failing
G to respond to or act upon his letter of 14 January 2022, requesting the change of guarantor, and in failing to secure D4 as guarantor when she became director of D3. The plaintiff contends that D1/D2's silence on his application amounted to implicit approval of the change in guarantor, and their failure to secure D4 as guarantor during her directorship (3 August 2022
H to 19 January 2024) constitutes negligence, particularly given D4's creditworthiness as a medical doctor owning several clinics and pharmacies. The plaintiff emphasises that D1/D2's conduct was inconsistent with their previous practice of releasing guarantors (Rinol Azhar and Kamaruddin) when they ceased being directors.

I

[14] D1 and D2 submit that the guarantee agreements were entered into by the plaintiff in his personal capacity, not as a director, and that these agreements explicitly state that the guarantor's obligations continue until all debts are fully settled. They argue that the vesting order, of which the plaintiff had clear knowledge through multiple channels including published advertisements and direct notice, transferred all rights and obligations to D2, leaving no privity between the plaintiff and D1. They contend that any banker-customer relationship had been terminated through notices of demand and termination in 2015, prior to the JIDs, and the plaintiff never challenged his status as guarantor after his resignation as director in 2020 despite knowing about these judgments. The defendants emphasised that they had no duty to respond to the plaintiff's letter about the change in guarantor, were not privy to the SSA, and never received a formal application from D4 to become guarantor. They further argue that D4's subsequent resignation as director makes the plaintiff's claims academic, and that naming D1 as a party constitutes an abuse of process given the vesting order.

Analysis And Findings Of The Court

Exclusion Of D1 Due To Vesting Order

[15] D1 and D2 argue that pursuant to the vesting order, D1 transferred all of D3's financing accounts to D2, its subsidiary company and should be excluded from this action. They contend that this transfer effectively removed any privity between the plaintiff and D1, making D1's inclusion in the suit unnecessary and improper. D1 relies on s. 16(3) of the Development Financial Institutions Act 2002 to support its position on the binding effect of the vesting order. They maintain that proper notification was given to D3, and that there was no legal requirement to personally serve the vesting order on individual guarantors.

[16] The plaintiff argues that he was not properly informed of the vesting order dated 26 January 2015, which purportedly transferred D3's financing accounts from D1 to D2. He contends that as a guarantor, he should have been personally served with the vesting order, and that mere notification to D3 was insufficient. The plaintiff further asserts that D1 and D2 failed to comply with the statutory requirements for publicising the vesting order as per cl. 7 of the order itself and s. 16(4) of the Development Financial Institutions Act 2002. He maintains that these failures, coupled with the fact that D3 continued to repay its debts to D1, negate D1's argument for exclusion from the suit.

[17] Upon careful consideration of the arguments presented, the court finds in favour of D1 and D2 regarding the effect of the vesting order. The court notes that s. 16(3) of the Development Financial Institutions Act 2002

clearly states that a vesting order shall be binding on any person affected by it, regardless of whether that person is a party to the proceedings or has been given notice of them. It reads:

> Where the order of the High Court under subsection (1) provides for the transfer of any business vested in or held by the prescribed institution, either alone or jointly with any other person, then, by virtue of the order, that business shall, on and from the transfer date, become vested in or held by the other person either alone or, as the case may be, jointly with such other person, and the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, and shall be binding on any person affected by it, regardless that the person so affected is not a party to the proceedings under this section or any other related proceedings, or had no notice of the proceedings under this section or of other related proceedings.

[18] This provision effectively counters the plaintiff's argument about lack of personal service, as the law does not require individual notification to guarantors for the vesting order to be effective.

[19] Furthermore, the court finds that the plaintiff's contention regarding D1 and D2's alleged non-compliance with publication requirements does not negate the validity or effect of the vesting order. While proper publication is indeed a statutory requirement, any failure in this regard does not render the vesting order void or ineffective, particularly in light of the clear language in s. 16(3) of the Act. The court also notes that the continued repayment of debts to D1 by D3, if true, is a separate issue that does not affect the legal transfer of rights and obligations under the vesting order. Consequently, the court concludes that D1 has been properly excluded from the suit as a result of the vesting order, and the plaintiff's claims against D1 in this regard cannot be sustained.

[20] The court also finds merit in D1 and D2's arguments regarding the plaintiff's prior acknowledgment of the vesting order through his involvement in previous legal proceedings. It is noted that the vesting order was explicitly pleaded in the statements of claim for Suits 481 and 364, which were served on the plaintiff in his capacity as director and managing director of D3. The plaintiff's subsequent actions, including filing a memorandum of appearance dated 4 November 2016 through D3's then solicitors, and another memorandum of appearance on 12 July 2023 in Suit 481, demonstrate his awareness of these proceedings and, by extension, the existence and effect of the vesting order. The court considers that the plaintiff had ample opportunity to challenge the validity or applicability of the vesting order during these earlier proceedings but failed to do so. This failure to raise the issue at the appropriate time, coupled with his active participation in the legal processes that stemmed from the vesting order's

implementation, effectively estops the plaintiff from now claiming ignorance of or challenging the vesting order's effect. The principle of *res judicata* further bars the plaintiff from raising issues in the current proceedings that could and should have been addressed in the previous suits. Therefore, the court concludes that the plaintiff's arguments regarding lack of knowledge or improper notification of the vesting order cannot be sustained in light of his prior conduct and involvement in related legal proceedings.

Release And Discharge Of The Plaintiff As Guarantor

[21] The plaintiff contends that he should be released from his obligations as guarantor for D3's loans on several grounds. Firstly, he argues that the sale of his shares in D3 to D4 and his resignation as director extinguishes his liability as guarantor. Secondly, he submits that D4's undertaking in the SSA dated 25 February 2022 to take over the guarantees is binding on D1 and D2, and thus they ought to have substituted D4 in place of the plaintiff. Thirdly, the plaintiff contends that D1 and D2's failure to respond to his letter dated 14 January 2022 requesting to be released as guarantor amounts to an implicit approval of his request.

[22] On the other hand, D1 and D2 argue that the plaintiff's liability as guarantor is in his personal capacity and not contingent on his position as shareholder or director of D3. They submit that the guarantees are expressly stated to be continuing in nature until an absolute discharge is granted by D1/D2. D1 and D2 further contend that they are not privy to the SSA between the plaintiff and D4, and thus any arrangement therein for D4 to assume the guarantees do not bind them. They also argue that they had no obligation to respond to the plaintiff's letter dated 14 January 2022 as it was not a formal application by D3 for change of guarantor. Finally, D1 and D2 deny any negligence, stating that they took steps to seek confirmation from D3 regarding the change of guarantor *via* letter dated 17 February 2023, but received no response.

[23] After careful consideration of the submissions and evidence before me, I am unable to accede to the plaintiff's contentions. The pivotal question is whether the plaintiff should be released from his obligations as guarantor for D3's loans. To determine this, it is necessary to examine the terms of the relevant guarantees.

[24] A perusal of the financing facility guarantee and the HP guarantee reveals that the plaintiff's liability as guarantor is indeed in his personal capacity and not contingent on his position as shareholder or director of D3. Clause 8 of the financing facility guarantee states:

> Our liabilities and obligations created hereunder shall continue to be valid and binding for all purposes whatsoever notwithstanding any change by amalgamation, reconstruction or otherwise which may be made in your

A constitution or of the Borrower and we hereby agree and declare that no change of any sort whatsoever in relation to or affecting the Borrower shall in any way affect our liabilities and or obligations created hereunder in relation to any transaction whatsoever, whether past, present or future.

[25] Similarly, cl. 9 of the HP guarantee provides:

B Our liability and obligation created hereunder shall continue to be valid and binding for all purposes whatsoever notwithstanding any change by amalgamation, reconstruction or otherwise which may be made in your constitution or of the Hirer and we hereby agreed and declare that no change of any sort whatsoever in relation or affecting the Hirer shall in any way affect our liabilities and or obligations created hereunder in C relation to any transaction whatsoever, whether past, present or future.

[26] These clauses clearly indicate that changes in D3's shareholding or directorship do not affect the plaintiff's obligations as guarantor. Furthermore, both agreements expressly state that they are continuing D guarantees. Clause 14 of the financing facility guarantee states:

This guarantee & indemnity agreement is expressly intended to and shall be a continuing guarantee & indemnity agreement for all monies whatsoever now or from time to time owing to you by the Borrower notwithstanding that the Borrower may at any time or time cease to be E indebted to you for any period or periods and notwithstanding any settlement of account(s).

[27] Clause 14 of the HP guarantee contains almost identical wording. These provisions make it clear that there is no automatic revocation of the guarantee upon the plaintiff ceasing to be a director or shareholder of D3.

F **[28]** The principle that a guarantee given in personal capacity continues despite changes in the guarantor's relationship with the borrower company is well-established in case law. In *Chung Khiaw Bank Ltd v. Soi Huan & Ors* [1985] CLJU 71; [1985] 1 LNS 71; [1986] 1 MLJ 188, the High Court held that directors who sign a guarantee in their personal capacity and they were G liable on it even if they had ceased to be directors. The court stated:

The next line of defence is that in law the surety is entitled to insist upon a rigid adherence to the terms of his obligation by the creditor and cannot be made liable for more than he had undertaken. Based on this, an argument has been mounted that the proper interpretation of the Bank's H letter dated November 29, 1979 which required that all directors of the Company should furnish a joint and several guarantee for the repayment of the loan was that the directors who had signed the guarantee were only to be liable thereon as long as they held office in the company as directors. In other words, it was submitted that the moment the defendants resigned their directorships on June 28, 1982, they I automatically ceased to be liable on the guarantees they had executed. The argument is so bizarre, that it is not worth a moment's consideration.

[29] Turning to the plaintiff's argument regarding the SSA, I find that D1 and D2 are not privy to this agreement between the plaintiff and D4. Any arrangement therein for D4 to assume the guarantees do not bind D1 or D2 in the absence of their express agreement. Clause 6.3(c) of the SSA merely imposes an obligation on D4 to facilitate the substitution but does not in itself effect the change. As such, the SSA has no impact on the subsisting contractual obligations of the plaintiff under the guarantees.

[30] It bears emphasis that both guarantee agreements define the plaintiff as a principal debtor, not merely as surety. Clause 1 of the financing facility guarantee states:

> To pay and satisfy you on demand as principal obligators and not merely as surety all and any part of the Indebtedness ...

[31] Similarly, cl. 1 of the HP guarantee provides:

> To pay and keep you indemnified and satisfy you on demand as principal debtor and not merely as surety all every part of the Total Rent Instalments ...

[32] The effect of such clauses has been elucidated by the Federal Court in *Andrew Lee Siew Ling v. United Overseas Bank (Malaysia) Bhd* [2013] 1 CLJ 24; [2013] 1 MLJ 449, where it was held that a guarantor who provides an indemnity is primarily liable as a principal debtor, with their liability independent of and potentially exceeding that of the principal borrower. The court stated:

> It is our considered view that in the present case the appellant, being a person who has given a guarantee and more importantly an indemnity, is primarily liable for losses which the principal borrower could not have been made liable. His liability is not dependent or secondary to the liability of the principal borrower. He is a principal debtor himself. The liability under a contract of indemnity does not depend on whether the principal debt is enforceable. It has no reference in law to the obligation of any third person. In essence, the liability of the person who has given an indemnity can be more extensive than that of the liability of the principal borrower.

[33] As principal debtor, the plaintiff is not automatically discharged by virtue of changes in D3's shareholding, directorship or constitution. His liability persists as long as the loans remain outstanding.

[34] Regarding the plaintiff's contention that D1 and D2's failure to respond to his letter dated 14 January 2022 amounts to implicit approval, I find this argument untenable. As held in *Hong Leong Bank Bhd v. WT Industries Sdn Bhd & Ors* [2005] 8 CLJ 239, the relationship between a bank and a borrower/guarantor is strictly governed by the terms of their agreement. It was stated:

A The commercial relationship between the plaintiff and the first defendant was founded upon the transactions between a banker and a borrower, and their contractual rights and obligations were governed by the terms and conditions of the facilities. The plaintiff, therefore, owed the first defendant no fiduciary duty or duty of care.

B **[35]** There is no general duty on the bank to respond to every communication from a guarantor. Furthermore, as pointed out by D1 and D2, the proper procedure for change of guarantor would be a formal application by D3, not a unilateral request by the plaintiff.

[36] In conclusion, based on the clear terms of the guarantee agreements
C and the established legal principles, I find that the plaintiff remains liable as guarantor notwithstanding the share sale to D4 and his resignation as director of D3.

Negligence And Breach Of Duty By D1 And D2

D **[37]** The plaintiff contends that D1 and D2 were negligent and acted in breach of duty by failing to respond to his letter dated 14 January 2022 requesting release from the guarantees, and by omitting to secure a replacement guarantee from D4 upon her becoming a shareholder and director of D3. The plaintiff argues that D1 and D2, as professional lenders,
E owed him a duty of care to facilitate his release as guarantor once he had divested his interest in D3. He submits that their failure to do so, particularly given their knowledge of the SSA between himself and D4, amounts to a breach of the standard of care expected of reasonably competent bankers.

[38] D1 and D2, on the other hand, deny any negligence or breach of duty.
F They argue that their relationship with the plaintiff was purely contractual, governed by the terms of the guarantee agreements. They contend that they had no duty to release the plaintiff simply because he wished to divest his interest in D3, nor did they have any obligation to secure a replacement guarantee from D4. D1 and D2 submit that the plaintiff's letter of 14 January
G 2022 did not constitute a formal application for substitution of guarantor, which would need to come from D3 as the primary obligor. They further argue that the SSA between the plaintiff and D4 did not create any duty on their part, as they were not privy to this agreement. D1 and D2 maintain that they acted in accordance with the terms of the guarantee agreements and the established principles of banking law.

H **[39]** Having carefully considered the submissions of both parties, I now turn to my analysis of the issues raised.

[40] The issue laid out before this court is whether D1 and D2 owed a duty of care to the plaintiff in the performance of their functions as lenders to
I procure his release as guarantor or to ensure his replacement by D4. This

necessitates a thorough examination of the nature of the relationship between the parties and the legal principles governing guarantees and banker-customer relationships.

[41] It is a well-established principle in banking law that the relationship between a bank and its customer is primarily contractual in nature. This principle was clearly articulated in *Hong Leong Bank Bhd v. WT Industries Sdn Bhd & Ors*, where the High Court held that in a banker-borrower relationship, the bank owes no fiduciary duty or duty of care to the borrower, and the parties are strictly bound by the terms and conditions of their contractual agreement.

[42] In light of this authority, I find no basis for imposing on D1 and D2 a duty of care to release the plaintiff simply because he wished to divest his interest in D3. The plaintiff's obligations as guarantor stemmed from the guarantee agreements, and in this context, the lender-borrower relationship is governed entirely by the contractual terms. D1/D2's responsibilities to the plaintiff cannot extend beyond what was stipulated in the contract documents.

[43] Turning to the plaintiff's contention that D1 and D2 were negligent in failing to respond to his letter dated 14 January 2022, I find this argument untenable. The letter cannot be construed as a formal application for substitution of guarantor, as this would need to emanate from the borrower, D3. A guarantor cannot unilaterally seek his own discharge without the involvement of the primary obligor.

[44] Moreover, the letter was issued to D1 after the 2015 vesting order, which had transferred the administration of the loans to D2. D1 was therefore not the correct party to address the request to. The plaintiff's argument that D1/D2's silence in response to his letter should be taken as consent, based on *Jetara Sdn Bhd v. Maju Holdings Sdn Bhd* [2007] 3 CLJ 41; [2007] 3 MLJ 609, is not applicable in this context. Sections 3 and 4 of the Contracts Act 1950 clearly define how communication of proposals and acceptances are to be made, and silence does not constitute acceptance.

[45] As to the failure to replace the plaintiff with D4, there is similarly no legal foundation for a duty on D1/D2's part. In a banker-customer relationship, the bank has a duty to exercise reasonable care and skill in interpreting, ascertaining, and carrying out the customer's instructions, adhering to the standard of care expected of an agent fulfilling its principal's mandate as established in *Astana International Sdn Bhd & Ors v. RHB Bank Bhd & Ors* [2012] CLJU 94; [2012] 1 LNS 94; [2012] 3 MLJ 758. However, in the present case, there was no mandate by D3 as customer to vary the guarantees or accept D4 as substitute. In the absence of instructions from D3, D1 and D2 had no positive obligation to proactively effect a change of guarantor simply because they may have been aware of the SSA.

[46] The complaint that D2 failed to properly assess D4's creditworthiness for suitability as replacement guarantor is also unsustainable as it presupposes a duty to accept her in the first place. Without an actual application by D3 to substitute D4 as guarantor, the issue of evaluating D4's financial standing does not arise.

[47] Moreover, the SSA did not necessitate nor give rise to any duty on the part of D1 or D2 to ensure that D4 assumes the guarantees in the plaintiff's stead. The SSA bound D4 to undertake the necessary formalities for the change of guarantor but did not impose a corresponding duty on D1/D2 to accept the arrangement. It was incumbent on the plaintiff himself to follow through and ensure D4 formally applies to D1/D2 to take over the guarantees. He cannot blame D1 or D2 for his own omission in failing to compel D4's performance of her obligation under the SSA.

[48] The plaintiff's reliance on cases such as *New Ace Digital Print Sdn Bhd & Anor v. Public Bank Bhd* [2017] 9 CLJ 439; [2018] 1 MLJ 769 and *CIMB Bank Bhd v. Lee Kim Kee & Ors And Another Appeal* [2018] 9 CLJ 168; [2018] 3 MLJ 72 to argue that banks can be liable for negligence in certain circumstances is misplaced. These cases dealt with specific scenarios where banks failed to follow established procedures or industry standards.

[49] In *New Ace Digital Print*, the Court of Appeal held that the bank was strictly liable for wrongfully paying a sum of money from a joint account based on a forged cheque, despite the survivorship clause. The court found that the bank breached its duty by failing to follow the mandate requiring both account holders' signatures and by not freezing the account upon one account holder's death.

[50] In *CIMB Bank Bhd v. Lee Kim Kee*, the court held CIMB Bank liable for negligence after the bank failed to exercise reasonable care in detecting fraudulent documents used by the plaintiff's lawyer, who wrongfully transferred RM560,512.50. The fraud was deemed outside the scope of the law firm's business, absolving the firm and its other partner of liability, and the plaintiff's claim was not time-barred as the fraud was only discovered with reasonable diligence in 2002.

[51] In the present case, there is no evidence that D1 or D2 deviated from any established banking practices in their dealings with the plaintiff.

[52] In conclusion, D1/D2's failure to act on the plaintiff's letter or knowledge of the SSA does not constitute negligence as the element of a breached duty of care is plainly lacking. The plaintiff's complaint that D1/D2 did not take reasonable steps to ensure D4 is made guarantor before her resignation as director is also unsustainable. D1 and D2 rightly point out

that any duty to procure D4's guarantee would be owed to themselves as lenders and not to the plaintiff. For these reasons, I find that the plaintiff's claims of negligence and breach of duty against D1 and D2 must fail.

D1/D2's Silence And Estoppel

[53] The plaintiff contends that D1/D2's non-response to his letter dated 14 January 2022 amounts to an implicit approval of his request to be released as guarantor and substituted by D4. He argues that their silence, particularly in light of their knowledge of the SSA between himself and D4, should be construed as acceptance of the proposed change in guarantor. The plaintiff relies on the principle established in *Jetara Sdn Bhd*, where the court held that a party's silence in response to letters can be taken as agreement. He further submits that D1/D2's failure to object to his request creates an estoppel, precluding them from now enforcing the guarantees against him.

[54] D1 and D2, on the other hand, argue that their silence cannot constitute acceptance of the plaintiff's request to be released as guarantor. They contend that the parties' relationship is governed by the law of contract, and any variation of a material term, such as the identity of the guarantor, requires express agreement. D1/D2 submit that they were under no obligation to respond to the plaintiff's letter, as a valid application to substitute the guarantor would need to come from the borrower, D3, not from the plaintiff in his individual capacity. They rely on ss. 3 and 4 of the Contracts Act 1950 to support their position on what constitutes a valid acceptance. Furthermore, D1/D2 argue that the principles of estoppel do not apply in this case, as there was no clear representation made by them, nor any detrimental reliance by the plaintiff.

[55] Having carefully considered the submissions of both parties, I now turn to my analysis of the issues raised.

[56] The question before this court is whether D1/D2's non-response to the plaintiff's letter dated 14 January 2022 can be construed as an implicit approval of his request to be released as guarantor and substituted by D4. This necessitates a thorough examination of the principles governing contract formation, particularly in the context of banking relationships, as well as the doctrine of estoppel.

[57] It is a fundamental principle of contract law that silence cannot constitute acceptance unless there is a legal duty to speak. This principle is codified in ss. 3 and 4 of the Contracts Act 1950. Section 3 states:

> The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting, or revoking, by which he intends to communicate the proposal, acceptance, or revocation, or which has the effect of communicating it.

[58] Section 4(1) further clarifies:

> The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

[59] These provisions make it clear that a positive act of communication is required for acceptance. Mere silence or inaction cannot be construed as assent by conduct.

[60] In the context of banking relationships, there is no principle that silence amounts to acceptance. As held in *Hong Leong Bank Bhd v. WT Industries Sdn Bhd & Ors*, in a banker-borrower relationship, the bank owes no fiduciary duty or duty of care beyond the contractual terms. This principle underscores the need for express communication in varying contractual terms.

[61] Turning to the facts of the present case, the plaintiff's letter dated 14 January 2022 requested a material variation of the guarantee agreement, namely the substitution of himself as guarantor with D4. Such a request, even if it had come from the correct party (which it did not, as will be discussed later), would require express agreement from D1/D2. Their silence or inaction cannot be construed as assent to this proposed variation.

[62] The plaintiff's reliance on *Jetara Sdn Bhd* is misconceived. While the court in that case did hold that silence could be taken as agreement in certain circumstances, those circumstances are distinguishable from the present case. In *Jetara*, the silence was in response to letters confirming the completion of works, a factual matter within the ordinary course of business. Here, the plaintiff's letter proposed a fundamental alteration of the contractual relationship. The principle in *Jetara* cannot be extended to cover such a situation.

[63] Furthermore, and crucially, the plaintiff's unilateral request did not cast any duty on D1 or D2 to respond. As discussed in the earlier part of this judgment, an application to substitute the guarantor would need to come from the borrower, *ie*, D3, and not the plaintiff in his individual capacity.

[64] It is a *non sequitur* to suggest that a failure to object to a request which is in itself invalid gives rise to an operative acceptance. I therefore reject the implicit approval argument as being wholly without basis.

[65] Turning to the issue of estoppel, it is well-established that for estoppel by representation to apply, there must be a clear representation that was intended to be relied on. D1/D2's non-response to the plaintiff's letter does not amount to a clear representation that they agree to release him. Nor is there any pleaded act or omission that can be construed as a manifestation of such agreement.

[66] Moreover, for estoppel to arise, there must be detrimental reliance on the representation. In the present case, it is significant that the plaintiff did not alter his position in any way in reliance on the alleged representation. He had already resigned as director and divested his shares before writing to D1. The share sale was not premised on any representation or assurance by D1/D2 that they would agree to the substitution. Estoppel cannot arise in the absence of detrimental reliance.

[67] In conclusion, I find that D1/D2's non-response to the plaintiff's letter does not amount to an implicit approval of his request to be released as guarantor and substituted by D4. The principles of contract law, particularly as they apply in the banking context, do not support such an interpretation. Furthermore, the doctrine of estoppel is not applicable in this case due to the absence of a clear representation and detrimental reliance.

[68] This conclusion is further supported by the principle established in *Bank Pembangunan Malaysia Bhd v. Ketheeswaran M Kanagaratnam* [2022] 6 CLJ 513, where the Court of Appeal held that guarantees should be strictly interpreted based on the parties' intentions. The court stated that the appellant's rights to enforce the guarantee and the respondent's liability were found within the four corners of the guarantee itself. The plaintiff's attempt to introduce an implied term based on D1/D2's silence runs counter to this principle of strict interpretation.

No Inconsistency Or Discrimination In Treatment Of Guarantors

[69] The plaintiff submits that D1/D2 have acted inconsistently and discriminatorily by previously releasing other guarantors, namely Rinol Azhar and Kamaruddin, upon their resignations as directors of D3, while refusing to accord the plaintiff the same treatment. The plaintiff argues that this demonstrates preferential treatment towards certain guarantors and unfair discrimination against him. He contends that as he is no longer a director or shareholder of D3, having sold his shares to D4, he should be released from his guarantor obligations in line with the precedent set by D1/D2's past conduct. The plaintiff relies on *Dato' Mohamad Yusof A Bakar & Anor v. Datuk Bandar Kuala Lumpur* [2019] CLJU 1494; [2019] 1 LNS 1494; [2019] MLJU 1098, arguing that D1/D2's discretion must be exercised in a fair and proper manner based on all facts and circumstances.

[70] D1/D2 maintain that the previous releases of Rinol Azhar and Kamaruddin are clearly distinguishable from the present situation. They argue that in those instances, D3 had formally applied to D1/D2 for the discharge of those guarantors, and these applications were approved by D1/D2 in the exercise of their contractual discretion. D1/D2 contend that in the present case, there was no formal application by D3 or D4 to release the plaintiff or name D4 as a substitute guarantor. They assert that a change of

guarantor cannot be unilaterally imposed on D1/D2 by the guarantor himself, and the initiative must come from the borrower, D3. D1/D2 rely on the principles set out in *WT Steel Sdn Bhd v. SVR Builders (M) Sdn Bhd & Ors* [2023] CLJU 1520; [2023] 1 LNS 1520, arguing that the plaintiff remains bound by the terms of the guarantee agreements despite no longer being a director or shareholder of D3.

[71] After careful consideration of the submissions by both parties, I find the plaintiff's complaint of inconsistent and discriminatory treatment to be without merit. The crucial distinction lies in the process by which the previous guarantors were released compared to the present situation.

[72] In the cases of Rinol Azhar and Kamaruddin, the evidence shows that D3, as the borrower, made formal applications to D1/D2 requesting their release as guarantors. This is a critical fact that distinguishes those situations from the present case. The release of a guarantor is not an automatic right upon ceasing to be a director or shareholder, but rather a matter of contractual discretion to be exercised by the lender upon proper application by the borrower.

[73] In the present case, it is undisputed that neither D3 nor D4 made any formal application to D1/D2 for the release of the plaintiff as guarantor or for the substitution of D4 in his place. The plaintiff's letter dated 14 January 2022 to D1 informing of his intention to sell his shares and requesting to be released as guarantor does not constitute a proper application by the borrower. Further, the plaintiff acknowledged in his letter dated 14 January 2021 that his guarantee was given in his personal capacity, not as a director. Therefore, I find that D1/D2's treatment of the plaintiff was not inconsistent or discriminatory, but rather based on the specific circumstances of his case and in line with their contractual rights and commercial judgment.

[74] The case of *Dato' Mohamad Yusof A Bakar & Anor v. Datuk Bandar Kuala Lumpur* relied on by the plaintiff to argue that D1/D2's discretion must be exercised in a fair and proper manner based on all facts and circumstances does not assist the plaintiff because it deals with fundamentally different legal and factual contexts. The case primarily addresses issues of natural justice, procedural fairness, and legitimate expectations in urban planning decisions and public hearings, not commercial banking relationships or guarantee agreements. The legal principles discussed relate to the exercise of discretionary powers by public authorities in planning matters, rather than the interpretation and enforcement of guarantee contracts. Furthermore, the court's findings about fairness and disclosure obligations are specific to planning authorities conducting public inquiries, not to banks deciding whether to release guarantors. While the case establishes some general principles about fairness in administrative decision-making, these are not directly applicable to the contractual relationship between a bank and a

guarantor. Therefore, the case provides no substantive support for the plaintiff's arguments about inconsistent treatment in releasing guarantors in a commercial banking context.

No Fiduciary Relationship

[75] The plaintiff contends that D1/D2 owed him fiduciary duties which were breached by their failure to secure his release as guarantor or his substitution by D4. He argues that given the long-standing relationship between the parties and the trust placed in D1/D2 to manage the financial arrangements, a fiduciary relationship had arisen. The plaintiff submits that this relationship required D1/D2 to act in his best interests, including taking steps to release him from his guarantor obligations once he was no longer a director or shareholder of D3.

[76] D1/D2 deny the existence of any fiduciary relationship with the plaintiff. They argue that their relationship with the plaintiff was purely contractual, based on the terms of the guarantee agreements and the underlying loan facilities. D1/D2 contend that a banker-customer relationship, including that between a lender and guarantor, does not inherently give rise to fiduciary duties. D1/D2 maintain that their actions were entirely within their contractual rights and did not breach any fiduciary obligations.

[77] After careful consideration of the parties' submissions, I find that the plaintiff's allegation of a fiduciary relationship between himself and D1/D2 is unsustainable. The evidence before me does not support the existence of such a relationship, nor any breach of fiduciary duties.

[78] The principle established in *Hong Leong Bank Bhd v. WT Industries Sdn Bhd & Ors* is directly applicable to this case. In this case, the bank granted several banking facilities to WT Industries, which later defaulted, prompting the bank to review and recall the facilities and demand repayment of the outstanding amount. The first defendant argued that the bank's recall of the facilities was premature and malicious, asserting that the bank owed them a fiduciary duty and had breached this duty by recalling the facilities without fulfilling certain conditions. The court held that no fiduciary duty or duty of care exists in a banker-borrower relationship, which is governed strictly by the contractual terms, and therefore, the bank's recall of the facilities was lawful and not malicious. This principle extends to the relationship between a lender and a guarantor.

[79] This clear statement of principle undermines the plaintiff's assertion that a fiduciary relationship existed.

[80] Furthermore, the guarantee agreements signed by the plaintiff clearly set out the terms of his obligations and D1/D2's rights. As held in *Heng Cheng Swee v. Bangkok Bank Ltd* [1979] CLJU 179; [1979] 1 LNS 179, a contract of guarantee depends primarily on its expressed terms and cannot be varied by oral evidence or implication. The plaintiff has not provided any evidence of terms in the guarantee agreements that would create a fiduciary relationship.

[81] In conclusion, I find that no fiduciary relationship existed between the plaintiff and D1/D2. Their relationship was purely contractual, governed by the terms of the guarantee agreements. Consequently, there can be no breach of fiduciary duty as alleged by the plaintiff. D1/D2's actions in maintaining the plaintiff's guarantor status and not securing his release or substitution were entirely within their contractual rights and did not violate any fiduciary obligations.

Case Suitable For Summary Determination

[82] In totality, I am satisfied that this case does not involve any complex factual or legal issues warranting a full trial. The disputes essentially centre around the construction of the guarantees and the legal effect of the SSA, the vesting order and the plaintiff's resignation as director and shareholder of D3. These are all questions of law that are capable of summary determination based on established contractual and legal principles.

[83] The various complaints of breach of duty, negligence and misrepresentation do not give rise to triable issues as the essential elements of such causes are simply not made out. There are also no material disputes of fact on the central issues that require findings upon oral testimony. Questions such as whether the SSA binds D1/D2 and whether the plaintiff's obligations as guarantor persist despite his resignation and the share sale are all matters of contractual interpretation.

[84] The principles for striking out as lucidly set out in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 and *Mohamed Yusop Abdul Wahab v. American Express (M) Sdn Bhd* [2002] 7 CLJ 81; [2002] 6 MLJ 507 are fully engaged here. The issues raised by the plaintiff are not complex and can be resolved by examining the relevant legal instruments. There is no necessity for a full trial or any oral evidence. This is not a case falling within the category of cases espoused in *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1; [2016] 3 MLJ 1; *Metroplex Holdings Sdn Bhd v. Commerce International Merchant Bankers Bhd* [2013] 8 CLJ 329; [2013] 4 MLJ 520 and *Sivakumar Varatharaju Naidu v. Ganesan Retanam* [2010] 9 CLJ 825; [2011] 6 MLJ 70, where the determination of the disputes is said to require *viva voce* evidence.

Conclusion

[85] For the cumulative reasons aforesaid, I allow D1 and D2's application to strike out the plaintiff's action in its entirety with costs. The plaintiff's claim is plainly unsustainable and devoid of any triable issues. It is an abuse of process to compel D1 and D2 to endure the time and expense of defending such an unmeritorious action through to trial.

[86] The plaintiff's obligations as guarantor under the guarantee and indemnity agreements are independent of his status as director or shareholder of D3. They persist until discharged by full settlement of D3's loans. Neither the disposal of the plaintiff's shares nor his resignation extinguishes his liabilities, which are in the capacity of a principal debtor.

[87] D1 and D2 were not bound by the SSA between the plaintiff and D4 and owed no duty to the plaintiff to release him or accept D4 as replacement guarantor in the absence of a proper application by D3. The complaint of negligence and breach of duty for failing to act on the plaintiff's unilateral request or knowledge of the SSA is wholly unfounded as the essential elements of such causes are lacking. There was simply no obligation to respond to the plaintiff's invalid request or to procure a guarantee from D4.

[88] The contention that D1/D2's silence constituted an implicit acceptance of the plaintiff's release or the substitution of D4 is plainly erroneous and finds no support in law or the factual matrix. Equally baseless is the allegation of inconsistent and discriminatory treatment of the plaintiff as compared to previous guarantors. The prior releases of other guarantors are distinguishable and do not render D1 and D2's conduct in the present case discriminatory.

[89] I also find no fiduciary relationship between the parties, as D1 and D2 merely acted as lenders to protect their commercial interests. The arms-length banker-customer relationship between a lender and guarantor does not ordinarily attract fiduciary obligations.

[90] All considered, the various causes pleaded are unsustainable in law and the factual allegations even if proved do not disclose any reasonable cause of action. The complaints of breach of contract, negligence, misrepresentation and breach of fiduciary duty are hopeless and unmeritorious. A full trial is unwarranted as the disputes can be summarily determined as questions of law without the need for oral testimony.

[91] On a final note, I observe that the present action appears to be a collateral attempt by the plaintiff to avoid liability under the guarantees and frustrate enforcement of the judgments already obtained against him by the second defendant in Suit 364 and Suit 481. Having failed to set aside those

A regular judgments, the plaintiff now seeks to impugn them through these backdoor proceedings founded on fallacious causes of action. This is a patent abuse of process and the court must not condone or facilitate such vexatious conduct. The principles against re-litigation, as articulated in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783, militate against
B entertaining this action.

[92] D1 and D2 have comprehensively demonstrated that the plaintiff's action is frivolous, vexatious and unsustainable. The high threshold for striking out has been met as this is a plain and obvious case where the claim is so clearly untenable that it cannot succeed. To allow the matter to continue
C would inflict unnecessary expense and injustice on D1 and D2.

[93] I therefore grant order in terms of D1 and D2's applications in encls. 129 and 128, respectively. The plaintiff's action against them is hereby struck out with costs. I order costs of RM4,000 to be paid by the plaintiff for each enclosure.
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